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Supreme Court of the United States

OCTOBER TERM, 1954

No. 131

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE E. BARNES, R. SARCHETT AND THE ORDER OF RAILROAD TELEGRAPHERS, PETITIONERS,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY AND J. E. KEMP

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 11, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 53-C-1245

Illinois Central Railroad Company, Plaintiff,

vs.

National Railroad Adjustment Board, et al., Defendants

Statement

The above cause was filed May 22, 1953. Illinois Central Railroad was the original plaintiff, and National Railroad Adjustment Board, Third Division and William H. Castle, R. M. Butler, Claude R. Barnes, C. P. Dugan, J. W. Whitehouse, E. T. Horsley, J. E. Kemp, G. Orndorff, R. Sarchett, and J. H. Sylvester, as members of and constituting the Third Division of said Board, and Donald F. McMahon, acting as Referee, and Member of said Board, by direction of the National Mediation Board, were the original defendants. Order of Railroad Telegraphers was added as a party defendant on June 19, 1953, pursuant to leave of court.

1. May 22, 1953, verified complaint filed.
2. May 27, 1953, Illinois Central Railroad Company's motion for mandatory order or restraining order filed.
3. June 15, 1953, Motion of Order of Railroad Telegraphers to intervene as party defendant filed.
4. June 19, 1953, Answer of Order of Railroad Telegraphers filed.
5. June 17, 1953, Opposition of Order of Railroad Telegraphers to Motion for preliminary injunction filed.
6. June 17, 1953, Motion of Labor Members of Adjustment Board to dismiss complaint filed.
7. June 17, 1953, Opposition of Labor Members of Adjustment Board to motion for preliminary injunction filed.
8. June 19, 1953, Plaintiff's Memorandum Brief in Support of Motion for Mandatory Order filed.
9. June 29, 1953, Answer of defendant, carrier members of Adjustment Board, filed.

[fols. 3-4] 10. June 30, 1953, Amended verified complaint filed.

11. June 30, 1953, Motion of United States of America on behalf of defendant, National Railroad Adjustment Board, filed.

12. June 30, 1953, Memorandum of Points and Authorities on behalf of defendant, National Railroad Adjustment Board, filed.

13. July 2, 1953, Plaintiff's Memorandum of Points and Authorities in Opposition to Motion to dismiss filed.

14. July 2, 1953, Memorandum of Law of Defendant Carrier Members filed.

None of the defendants was arrested, nor was bail required. No property was attached or taken.

July 3, 1953, a hearing was had before the honorable Michael L. Igoe. No question was referred to a Master, commissioner or referee. On July 3, 1953, a preliminary injunction was entered as prayed by plaintiff. Notice of appeal was filed July 30, 1953.

The appellees and their attorneys of record are:

For the plaintiff, Illinois Central Railroad—Herbert J. Deany, John W. Foster, and Charles I. Hopkins, Jr., 135 E. Eleventh Place, Chicago, Illinois.

For the Carrier Members of the Adjustment Board—Kenneth F. Burgess, Donald F. Smith, D. Robert Thomas, Walter J. Cummings, Jr., and Sidley, Austin, Burgess & Smith, 11 South La Salle Street, Chicago, Illinois.

For the National Railroad Adjustment Board, an agency of the United States of America—Otto Kerner, Jr., United States Attorney, 450 U. S. Court House, Chicago, Illinois.

Jacobs, Kamin and Ratner, 201 North Wells Street, Chicago 6, Illinois.

Mozart G. Ratner.

Schoene & Kramer, 1625 K Street, N. W., Washington 6, D. C.

Milton Kramer, Counsel for Defendants-Appellants, Whitehouse, et al., and Order of Railroad Telegraphers.

[fol. 5] IN UNITED STATES DISTRICT COURT

MOTION—Filed May 27, 1953

Now comes the Illinois Central Railroad Company, plaintiff in the above-entitled cause, by Herbert J. Deany, John W. Foster and Charles I. Hopkins, Jr., its attorneys, and moves the Court for an order based upon the verified complaint heretofore filed herein:

1. Directing the defendants, and each of them, to forthwith serve or cause to be served due notice of the claim filed against plaintiff by the Order of Railroad Telegraphers in Docket No. TE-5722 before the National Railroad Adjustment Board, Third Division, upon D. A. Shears, 708 North Howard Street, Robinson, Illinois, and upon the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets, Cincinnati, Ohio, as required by Section 3(j) of the Railway Labor Act (45 U. S. C. A. Section 153j), and

2. Restraining and enjoining the defendants, and each of them, from proceeding with any disposition of said claim until such due notice has been served upon D. A. Shears, 708 North Howard Street, Robinson, Illinois, and upon the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets, Cincinnati, Ohio, or, in the alternative, for a preliminary order restraining said defendants and each of them from proceeding with a hearing or from taking any other action whatsoever in said Docket No. TE-5722 pending final hearing and determination of this action.

Dated at Chicago, Illinois, this 25th day of May, 1953.

Illinois Central Railroad Company, by Herbert J. Deany, John W. Foster, Charles I. Hopkins, Jr., Its Attorneys.

[fol. 6] IN UNITED STATES DISTRICT COURT

MOTION TO INTERVENE AS A DEFENDANT—Filed June 15, 1953

The Order of Railroad Telegraphers, by its undersigned attorneys, moves for leave to intervene as a defendant in this action in order to assert the defenses set forth in its proposed answer, of which a copy is hereto attached, on the ground that the representation of the applicant's interests by existing parties may be inadequate and the applicant may be bound by a judgment in this action; in that, as appears from paragraph VI of the Complaint, the applicant is the claimant before the National Railroad Adjustment Board, Third Division, in the claim having Docket No. TE-5722, which claim the plaintiff in this action seeks to enjoin the present defendants from considering further; the present defendants may assert no interest in protecting their right to consider the claim, whereas the applicant is entitled to have its claim considered and adjudicated by the Board in accordance with the provisions of the Railway Labor act but would effectively be deprived of that right by the relief requested by plaintiff.

Alternatively, The Order of Railroad Telegraphers moves to intervene as a defendant in this action in order to assert the defenses set forth in its proposed answer, of which a copy is hereto attached, on the ground that its claim upon the defendants to consider and adjudicate its claim in Docket No. TE-5722 in accordance with the Railway Labor Act, which plaintiff seeks to enjoin, and its claim upon plaintiff as presented in Docket No. TE-5722, present both questions of law and fact which are common to the main action.

Mozart G. Ratner, 201 N. Wells Street, Chicago, Illinois; Milton Kramer, Schoene and Kramer, 1625 K Street, N. W., Washington 6, D. C., Attorneys for The Order of Railroad Telegraphers.

[fol. 7] IN UNITED STATES DISTRICT COURT

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION—Filed June 17, 1953

Comes now the defendant The Order of Railroad Telegraphers (hereinafter referred to as "ORT"), by its attorneys, and opposes the Motion of the plaintiff for a preliminary injunction on the following grounds:

1. The complaint fails to state a claim against any defendant upon which relief can be granted.

2. This action involves and grows out of a labor dispute. The Norris-LaGuardia Act (29 U. S. C., secs. 101-15) deprives the Court of jurisdiction to grant injunctive relief in such an action.

3. The Railway Labor Act (45 U. S. C., secs. 151 ff.) specifies in section 3, First, (p) thereof the procedure for judicial review of awards of the National Railroad Adjustment Board and the determination of the validity of such awards. Such method of judicial review is exclusive. The Court is therefore without jurisdiction of the subject matter. *Washington Terminal Co.* v. *Boswell*, 124 F. (2d) 235 (C. A., D. C., 1941); *Switchman's Union* v. *Nat. Mediation Bd.*, 320 U. S. 297; *General Committee* v. *MKT R. Co.*, 320 [fol. 8] U. S. 323; *General Committee* v. *Southern Pac. Co.*, 20 U. S. 338; *Slocum* v. *D. L. & W. R. Co.*, 339 U. S. 239; see also *In Re Central R. of N. J.*, 145 F. (2d) 351, aff'd 326 U. S. 561; *Radio Officers Union* v. *Nat. Med. Bd.*, 181 F. (2d) 801.

4. Plaintiff has failed to exhaust its administrative remedies. *Yakus* v. *United States*, 321 U. S. 414.

5. The Board, with the defendant referee sitting as a member thereof, has not made, and will make unless enjoined, a final determination of plaintiff's contentions, including its contention that any award in favor of ORT would be invalid unless notice of the Board's proceeding is given to others than the parties before it. The Board may, or may not, agree with plaintiff's contentions, and rule accordingly. Until it has made a ruling, there is no case or controversy within the meaning of the Constitution, Article III.

6. The complaint, and the motion, are premature, and do not present a situation calling for equitable relief. The referee may decide this defendant's claim in favor of plaintiff on any one of the issues involved in the merits of the dispute, or on the issue of notice to others, or on both, or he may decide in favor of ORT both on the merits and on the question of notice. It is only in the event of the last contingency that plaintiff could even argue that it is harmed. And even if the last contingency is the one that eventuates, plaintiff cannot be harmed unless ORT institutes proceedings for the enforcement of the award. This action, and the motion, in substance ask for equitable relief by way of injunction because the referee, who has not yet determined any issue in the proceeding before him, may determine one of the issues erroneously, and such alleged error may, or may not, harm plaintiff, depending on how the referee determines other issues.

7. In the event the last contingency described in paragraph 6 is the one that eventuates and if ORT institutes proceedings to enforce compliance with the resulting award then if plaintiff's views concerning the requirement of notice are sound it will have an adequate defense to such enforcement proceedings, and will not be harmed. It thus has an adequate remedy at law.

8. As appears from paragraphs VI and XI of the Complaint, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes has its own contract with plaintiff governing the performance of [fol. 9] services in its craft. In such situation not only is BRC not a necessary part in Docket No. TE-5722, but it would not even be a proper party. *Order of Railroad Telegraphers* v. *N. O. T. and M. Ry. Co.*, 156 F (2d) 1 (C. C. A. 8, 1946), cert. den. 329 U. S. 758.

9. As it appears from paragraph XI of the complaint, BRC has actual knowledge of the dispute pending before the Board in Docket No. 5722. It is well settled that even in those situations where some courts have held that notice was required to be given to others than the parties before the Board, actual knowledge by such others of the pendency of the dispute before the Board satisfies such requirement. *Hunter* v. *A.T.&S.F. Ry. Co.*, 188 F. (2d) 294 (C. A. 7,

1951), cert. den. 342 U. S. 819; *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 8, 1937); *Kirby* v. *Penna. R. Co.*, 188 F. (2d) 793 (C. A. 3, 1951).

Wherefore, it is submitted that the motion for preliminary injunction should be denied.

Respectfully submitted, Milton Kramer, Schoene and Kramer, 1625 K Street, N. W., Washington 6, D. C.; Mozart G. Ratner, 201 North Wells Street, Chicago 6, Illinois.

[fol. 10] IN UNITED STATES DISTRICT COURT

OPPOSITION OF CERTAIN DEFENDANTS TO MOTION FOR PRELIMINARY INJUNCTION—Filed June 17, 1953

Come now the defendants J. W. Whitehouse, G. Orndorff, J. H. Sylvester, Claude R. Barnes, and R. Sarchet, by their attorneys, and oppose the motion for a preliminary injunction on the following grounds:

1. The complaint fails to state a claim against any defendant upon which relief can be granted.

2. This action involves and grows out of a labor dispute. The Norris-LaGuardia Act (29 U. S. C., secs. 101-15) deprives the Court of jurisdiction to grant injunctive relief in such an action.

3. The Railway Labor Act (45 U. S. C., secs. 151 ff.) specifies in section 3, First, (p) thereof the procedure for judicial review of awards of the National Railroad Adjustment Board and the determination of the validity of such awards. Such method of judicial review is exclusive. The Court is therefore without jurisdiction of the subject matter. *Washington Terminal Co.* v. *Boswell*, 124 F. (2d) 235 C. A., D. C., 1941); *Switchmen's Union* v. *Nat. Mediation Bd.*, 320 U. S. 297; *General Committee* v. *MKT R. Co.*, 320 U. S. 323; *General Committee* v. *Southern Pac. Co.*, 320 U. S. 338; *Slocum* v. *D. L. & W. R. Co.*, 339 U. S. 239; see also *In Re Central R. of N. J.*, 145 F. (2d) 351, aff'd 326 U. S. 561; *Radio Officers Union* v. *Nat. Med. Bd.*, 181 F. (2d) 801.

4. Plaintiff has failed to exhaust its administrative remedies. *Yakus* v. *United States*, 321 U. S. 414.

5. The Board, with the defendant referee sitting as a member thereof, has not made, and will make unless enjoined, a final determination of plaintiff's contentions, including its contention that any award in favor of ORT would [fol. 11] be invalid unless notice of the Board's proceeding is given to others than the parties before it. The Board may, or may not, agree with plaintiff's contentions, and rule accordingly. Until it has made a ruling, there is no case or controversy within the meaning of the Constitution, Article III.

6. The complaint, and the motion, are premature, and do not present a situation calling for equitable relief. The referee may decide ORT's claim in favor of plaintiff on any one of the issues involved in the merits of the dispute, or on the issue of notice to others, or on both, or he may decide in favor of ORT both on the merits and on the question of notice. It is only in the event of the last contingency that plaintiff could even argue that it is harmed. And even if the last contingency is the one that eventuates, plaintiff cannot be harmed unless ORT institutes proceedings for the enforcement of the award. This action, and the motion in substance ask for equitable relief by way of injunction because the referee, who has not yet determined any issue in the proceeding before him, may determine one of the issues erroneously, and such alleged error may, or may not harm plaintiff, depending on how the referee determines other issues.

7. In the event that the last contingency described in paragraph 6 is the one that eventuates and if ORT institutes proceedings to enforce compliance with the resulting award, then if plaintiff's views concerning the requirement of notice are sound it will have an adequate defense to such enforcement proceedings, and will not be harmed. It thus has an adequate remedy at law.

8. It appears from paragraphs VI and XI of the Complaint, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes has its own contract with plaintiff governing the performance of services in its craft. In such situation, not only is BRC not a necessary party in Docket No. TE-5722, but it would not even be a proper party. *Order of Railroad Telegraphers*

v. *N. O. T. and M. Ry. Co.*, 156 F. (2d) 1 (C. C. A. 8, 1946), cert. den 329 U. S. 758.

9. As appears from paragraph XI of the Complaint, BRC has actual knowledge of the dispute pending before the Board in Docket No. 5722. It is well settled that even in those situations where some courts have held that notice was required to be given to others than the parties before the Board, actual knowledge by such others of the pendency [fol. 12] of the dispute before the Board satisfies such requirement. *Hunter* v. *A. T. & S. F. Ry. Co.*, 188 F. (2d) 294 (C. A. 7, 1951), cert. den. 342 U. S. 819; *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 8, 1937); *Kirby* v. *Penna. R. Co.*, 188 F. (2d) 793 (C. A. 3, 1951).

Wherefore, the above-named defendants submit that the Motion for Preliminary Injunction should be denied.

Respectfully submitted, Milton Kramer.

[fol. 13] In United States District Court

* * * * * * *

Motion of Certain Defendants to Dismiss—Filed June 17, 1953

Come now the defendants J. W. Whitehouse, G. Orndorff, J. H. Sylvester, Claude R. Barnes, and R. Sarchett, by their attorneys, and move to dismiss the complaint herein, for the following reasons:

1. The complaint fails to state a claim against any defendant upon which relief can be granted, in that:

(a) Plaintiff has failed to exhaust its administrative remedies.

(b) The complaint, and the motion, are premature, and do not present a situation calling for equitable relief. The referee may decide ORT's claim in favor of plaintiff on any one of the issues involved in the merits of the dispute, or on the issue of notice to others, or on both, or he may decide in favor of ORT both on the merits and on the question of notice. It is only in the event of the last contingency that plaintiff could even argue that it is harmed. And even

if the last contingency is the one that eventuates, plaintiff cannot be harmed unless ORT institutes proceedings for the enforcement of the award. This action, and the motion, in substance ask for equitable relief by way of injunction because the referee, who has not yet determined any issue in the proceeding before him, may determine one of the issues erroneously, and such alleged error may, or may not, harm plaintiff, depending on how the referee determines other issues.

(c) As appears from paragraphs VI and XI of the complaint the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes has its own contract with plaintiff governing the performance of services in its craft. In such situation, not only is BRC not a necessary party in Docket No. TE-5722, but it would not even be a proper party.

(d) As appears from paragraph XI of the complaint, BRC has actual knowledge of the dispute pending before the Board in Docket No. 5722. It is well settled that even in those situations where some courts have held that notice was required to be given to others than the parties before the Board, actual knowledge by such others of the pendency [fol. 14] of the dispute before the Board satisfies such requirement.

2. The Court does not have jurisdiction of the subject matter.

(a) The Railway Labor Act (45 U. S. C., secs. 151 ff.) specifies the exclusive procedure for judicial review of awards of the National Railroad Adjustment Board and the determination of the validity of such awards.

(b) The Board, with the defendant referee sitting as a member thereof, has not made, and will make unless enjoined, a final determination of plaintiff's contentions, including its contention that any award in favor of ORT would be invalid unless notice of the Board's proceeding is given to others than the parties before it. The Board may, or may not, agree with plaintiff's contentions, and rule accordingly. Until it has made a ruling, there is no case or controversy within the meaning of the Constitution, Article III.

3. Plaintiff has an adequate remedy at law.

4. The only relief asked for is injunctive relief. The Norris-LaGuardia Act (29 U. S. C., secs. 101-15) deprives this Court of jurisdiction to grant injunctive relief in this action.

Respectfully submitted, Milton Kramer.

[fol. 15] In United States District Court

Answer of Intervenor the Order of Railroad Telegraphers—Filed June 29, 1953

Comes now the intervening defendant The Order of Railroad Telegraphers, by its attorneys, and for answer to the Complaint in this action says:

[fol. 16] First Defense

The complaint fails to state a claim against any defendant upon which relief can be granted.

Second Defense

Answering the allegations of the Complaint the intervening defendant (hereinafter referred to as "ORT") says:

I. It admits that plaintiff has been and is engaged in operating in Illinois and other States and is a common carrier by railroad in Illinois and between points in Illinois and in other States, and is without knowledge or information sufficient to form a belief concerning the remaining allegations of paragraph I of the Complaint.

II. It admits that the National Railroad Adjustment Board, Third Division (hereinafter referred to as the "Board") was created by the Railway Labor Act and has its principal office at 220 S. State Street, in Chicago. The remainder of paragraph II consists of conclusions not requiring answer; insofar as it may be construed to contain allegations of fact, they are denied.

III. It admits the allegations of paragraph III.

IV. It admits that Donald F. McMahon is a Referee selected by the National Mediation Board to act as a member of the Board for the purpose of disposing of certain

claims pending before the Board, and is without knowledge or information sufficient to form a belief concerning the remaining allegations of paragraph IV.

V. It admits that this action is of a civil nature and the matter in controversy exceeds $3,000 exclusive of interest and costs. The remaining allegations of paragraph V are conclusions of law not requiring answer; insofar as they may be construed to contain allegations of fact, they are denied.

VI. It admits that there is pending before the Board a proceeding instituted by ORT on or about June 12, 1951, against plaintiff, Docket No. TE-5722, and denies the remaining allegations of the first sentence of paragraph VI. It denies the allegations of the second sentence. It is without knowledge or information sufficient to form a belief concerning the allegations of the third sentence. It alleges that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as "BRC"), and several officers, repre-[fol. 17] sentatives, and members of BRC had actual knowledge of the filing of the claim of ORT with the Board, which claim is contained in Docket TE-5722, and of the proceedings in said matter, and have knowledge of the pendency of said claim before the Board, and that the record before the Board shows such knowledge.

VII. It admits that on or about August 11, 1951, the plaintiff filed its submission with the Board in which it argued that BRC should be given formal notice of the proceeding, and that in its Reply filed on or about October 4, 1951, plaintiff argued that the claim should be dismissed unless such notice were given. The remainder of paragraph VII consists of argument and conclusions not requiring answer; insofar as it may be construed to contain allegations of fact, it is denied.

VIII. It admits that on or about May 13, 1953, the dispute, Docket No. TE-5722, came on for hearing and that on said occasion one of the carrier members of the Board moved that the Board not proceed with the matter. It alleges that the basis of said motion was that formal notice of the proceeding had not been given to BRC, and alleges further that BRC had actual knowledge of the proceeding, and that the record before the Board showed such knowl-

edge. It denies that at said hearing any motion was made that the proceeding be dismissed for lack of jurisdiction. It is without knowledge or information sufficient to form a belief concerning the remaining allegations of the first sentence of paragraph VIII. It alleges further that no motion has been presented to the Board that notice be given to BRC, and that when the motion against proceeding was made a member of the Board who is a vice-president of BRC stated that BRC was not involved in the dispute submitted to the Board by ORT.

It admits that the hearing was suspended and that the motion that the Board not proceed was considered in a private meeting, and denies any other allegations that may be contained in the second sentence. It alleges that the said consideration of the motion by members of the Board in private was without the presence or participation of the referee, Donald F. McMahon, one of the defendants in this action. It alleges that prior to the appointment of a referee to sit as a member of the Board in considering the dispute, Docket No. TE-5722, the ten permanent members of the Board had divided evenly on the question of whether [fol. 18] the claim should be dismissed because formal notice had not been given to BRC; that that question is one of the issues presented to the defendant referee, and to the Board with the referee sitting as a member, for decision; and that unless restrained and enjoined by this Court from further considering the dispute, that question will be decided by the Board with the referee sitting as a member.

It admits that on the same day the hearing in Docket No. TE-5722 was resumed and that a carrier member of the Board announced that the motion not to proceed had resulted in a tie vote and was therefore lost, and is without knowledge or information sufficient to form a belief concerning any other allegations that may be contained in the third sentence. It alleges that the defendant referee was not present and did not participate in any consideration of said motion and did not vote concerning the disposition of said motion, and will, unless enjoined, decide whether the claim should be dismissed for lack of formal notice to BRC.

It denies the allegations of the fourth sentence.

It admits that the hearing was resumed on the same day; denies that plaintiff is advised that the Board does

not intend to and will not give notice to BRC and to D. A. Shears or either of them; alleges that the question of whether the claim should be dismissed for lack of notice to BRC is one of the issues that the Board, with the defendant referee Donald M. McMahon sitting as a member, will decide unless enjoined from making a decision; and is without knowledge or information sufficient to form a belief concerning the remaining allegations of the fifth sentence.

It is without knowledge or information sufficient to form a belief concerning the remaining allegations of paragraph VIII.

IX. It denies the allegations of paragraph IX.

X. It denies the allegations of the first sentence of paragraph X. The remainder of said paragraph consists of conclusions of law not requiring answer; insofar as it may be construed to contain allegations of fact, they are denied.

XI. It denies that the Board has failed to comply with the requirements of Section 3(j) of the Railway Labor Act, and alleges that the question of whether the said section requires that notice be given to BRC is one of the issues [fol. 19] presented to defendant referee Donald F. McMahon and which the Board, with said referee participating, will decide unless enjoined. It is without knowledge or information sufficient to form a belief concerning the remaining allegations of paragraph XI.

XII. Paragraph XII consists of conclusions of law not requiring answer, but ORT admits that any disposition of claims of rights of ORT under its contract with plaintiff, in Docket No. TE-5722, without formal notice served on BRC, would not adjudicate any rights, BRC may have under its contract with plaintiff, and alleges that such result would follow whether or not notice of Docket No. TE-5722 is served on BRC. Insofar as said paragraph may be construed to contain allegations of fact, they are denied.

XIII. It denied all allegations of fact contained in paragraph XIII.

XIV. Paragraph XIV consists of conclusions of law not requiring answer; insofar as it may be construed to contain allegations of fact, they are denied.

Third Defense

This action involves and grows out of a labor dispute, and the Court is deprived of jurisdiction to grant injunctive relief by the Norris-LaGuardia Act, 29 U.S.C., secs. 101-15.

Fourth Defense

(a) The Railway Labor Act specifies the method by which awards of the Board may be judicially reviewed and the validity thereof determined. The Court is without jurisdiction of the subject matter of this action.

(b) The contention of plaintiff that the claim should be dismissed for lack of notice to BRC has not yet been finally determined by the Board. Unless enjoined, the referee will make such determination. Until a final determination is made adverse to plaintiff's contentions, this action presents no case or controversy, and the Court is without jurisdiction of the subject matter.

Fifth Defense

BRC had and has actual knowledge of the submission to the Board by ORT of the dispute in Docket No. TE-5722, and of the pendency of said dispute before the Board. Inso- [fol. 20] far as the Railway Labor Act requires the Board to give notice of said dispute to BRC, which ORT denies, such requirement is satisfied by such actual knowledge. Wherefore, having fully answered, ORT prays that the complaint be dismissed.

Respectfully submitted, Mozart G. Ratner.

[fol. 21] In United States District Court

Answer of Defendant Carrier Members—Filed June 29, 1953

Now come defendants, William H. Castle, R. M. Butler, C. P. Dugan, E. T. Horsley, and J. E. Kemp, the Carrier Members of the Third Division of the National Railroad Adjustment Board (hereinafter referred to as Defendant

Carrier Members), by Sidley, Austin, Burgess & Smith, their attorneys, and answer the Complaint as follows:

1. Defendant Carrier Members are without knowledge or information sufficient to form a belief as to the truth of paragraph XIV of the Complaint, but they admit the allegations contained in the remaining paragraphs of the Complaint.

2. In further answer to paragraph VI, Defendant Carrier Members allege that D. A. Shears and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as the Brotherhood of Railway Clerks) are "employees * * * involved" within the meaning of Section 3(j) of the Railway Labor Act and that plaintiff is entitled to raise the issue of lack of due notice, as established by decisions of the federal courts construing said Act.

3. In further answer to paragraph VIII, Defendant Carrier Members allege that the Board's action on defendant Horsley's motion was reported in its minutes of May 13, 1953, a copy of which is attached hereto as Exhibit 1 and made a part hereof. The defendant Donald F. McMahon, the Referee herein, was not permitted to participate with the Board in considering the due notice question, as shown in Exhibit 2 attached hereto and made a part hereof.

4. In further answer to paragraph X of the Complaint, Defendant Carrier Members allege that in response to numerous decisions of the federal courts, the First Division of the National Railroad Adjustment Board regularly complies with the due notice provisions of Section 3(j) of the Act, as shown in Exhibit 3 attached hereto and made a part hereof. Defendant Carrier Members further allege that the Department of Justice refused to represent the Third Division of the National Railroad Adjustment Board in the [fol. 22] defense of *Allain* v. *National Railroad Adjustment Board, Third Division*, Civil Action No. 51 C 238 (N.D. Ill.) on the ground that said Division's failure to give due notice pursuant to Section 3(j) of the Act, deprived the aggrieved employees of their constitutional and statutory rights, as shown in Assistant Attorney General H. G. Morison's letter of May 11, 1951, a copy of which is attached hereto as Exhibit 4 and made a part hereof. A copy of Judge Barnes'

findings of fact and conclusions of law in the *Allain* case is attached hereto as Exhibit 5 and made a part hereof.

5. Defendant Carrier Members allege that they have been and are now willing for the Board to serve due notice of all hearings herein upon D. A. Shears and upon the Brotherhood of Railway Clerks as required by Section 3(j) of the Railway Labor Act, but that the five Labor Members of the Board are unwilling for the Board to do so, as shown in Exhibit 1 attached hereto and made a part hereof.

6. Defendant Carrier Members allege that the Railway Labor Act does not confer any power upon defendant Donald F. McMahon, the Referee in the proceedings before the Board, to decide the due notice question involved herein. Section 3(i), in certain circumstances, permits disputes between employees and a carrier "growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules, working conditions" to be referred to a Division of the National Railroad Adjustment Board, and Section 3(n) permits awards with respect to such disputes to be decided by a majority of all members of the Division. When a majority vote cannot be attained, Section 3(l) permits the appointment of a referee to make an award. However, no provision of the Act grants a referee authority to resolve the question whether due notice shall be given pursuant to Section 3(j). All the referee can do when the Board has not given the required due notice is either to vote to dismiss the claim or to vote to continue the claim (with no action as to the issuance of an award) until the Board gives due notice of the hearings. As shown in Exhibit 2 attached hereto and made a part hereof, this Division sat in executive session to rule on the due notice requirement of Section 3(j) and the referee was not permitted to attend the executive session, which was in accordance with the procedure of this Division, as shown in Exhibit 6 attached hereto and made a part hereof. Since the referee lacks any power to require [fol. 23] due notice to be given under Section 3(j) of the Act, this Complaint is timely.

7. Defendant Carrier Members allege that only parties and employees who have received due notice pursuant to Section 3(j) of the Railway Labor Act are permitted to participate in proceedings before the Third Division of

the National Railroad Adjustment Board, as shown in Exhibit 6 attached hereto and made a part hereof. Because the referee is without the power to determine the question of due notice and the Board has acted adversely on the question, neither D. A. Shears nor the Brotherhood of Railway Clerks will be afforded an opportunity to participate in the proceedings in Docket TE-5722 before the National Railroad Adjustment Board unless this Court grants appropriate relief.

8. Defendant Carrier Members allege that this Complaint is timely because, in view of the violation of Section 3(j) of the Act, the Board never acquired any jurisdiction in the premises. Having refused to exercise its duty under Section 3(j), the Board should be ordered to comply therewith.

Kenneth F. Burgess, Douglas F. Smith, D. Robert Thomas, Walter J. Cummings, Jr., Attorneys for William H. Castle, R. M. Butler, C. P. Dugan, E. T. Horsley and J. E. Kemp, Defendants.

[fol. 24] EXHIBIT 1 TO ANSWER

EXTRACT—MINUTES MAY 13, 1953 EXECUTIVE SESSION, THIRD DIVISION, NATIONAL RAILROAD ADJUSTMENT BOARD

At 3:55 P. M., the Third Division went into executive session to take up objection by Member E. T. Horsley to continuing with hearing before Referee McMahon of Docket TE-5722, which objection he stated as follows:

I object to proceeding with the hearing on Docket TE-5722 for the reason that the Third Division of the National Railroad Adjustment Board had not given due notice to the employes involved under Section 153(j) of the Railway Labor Act, amended.

The employes involved are the Brotherhood of Railway Clerks, or constituents thereof, and the Brotherhood of Railway Clerks has served personal notice upon the responsible officers of the Illinois Central Railroad, respondent in this docket, of their intention to file and prosecute claim for the same work involved in this proceeding if the claim brought by the Telegraphers' Organization is sustained in this proceeding.

After considerable discussion on the above matter, Mr. Horsley directed a question to the Secretary as to whether he had given notice to the Clerks' Organization. The Secretary asked the Chairman if it was proper for him to answer the direct question, and receiving an affirmative answer, stated that he had not given notice to the Clerk's Organization.

Mr. Kemp, Chairman, stated that the matter would come to a vote, and the matter to be voted on would be Mr. Horsley's objection to proceeding with this case in the absence of notice to the Clerk's Organization by the Board.

Upon vote the motion lost.

The Secretary was then requested to have the parties again appear, and the hearing before the referee resumed at 4:15 P. M.

[fol. 25] STATE OF ILLINOIS,
County of Cook, ss:

I, A. Ivan Tummon, Secretary of the Third Division of the National Railroad Adjustment Board, do hereby certify that the above is a true and correct copy of an extract from the minutes of May 13, 1953, of the Third Division of the National Railroad Adjustment Board.

(S.) A. Ivan Tummon.

Dated at Chicago, Illinois, this 8th day of June, 1953.

EXHIBIT 2 TO ANSWER

June 8, 1953

Stanley N. Barnes, Esq.
Assistant Attorney General
United States Department of Justice,
Washington, D. C.

Re: Illinois Central Railroad Company v. National Railroad Adjustment Board, 3rd Division—Civil No. 53 C 1245

DEAR SIR:

For consideration in determination of the steps to be taken for the defense of the above styled case, we are

making the following comments in answer to your queries (a) and (b), which are reproduced here for facility:

"(a) Whether the Board itself, as originally constituted, has finally voted and thereby finally decided not to give notice of the proceedings before the Board to the Clerks' Union and to Mr. D. A. Shears, the person now filling the position."

The Board, as originally constituted, voted upon the motion that the Board not proceed with this matter for want of jurisdiction because of notice not having been given. The motion failed to carry, as explained in paragraph VIII (page 4) of the Bill of Complaint, and this Division was thereby precluded from issuing such notice. During consideration of this motion in executive session of the Board, with the Secretary of this Division present, it was determined from the latter officer that such notice had not been given.

"(b) Whether the question of giving notice is still an [fol. 26] issue before the Board (including the referee among its membership) yet to be decided."

It is this Division's practice to consider all matters of procedure in a so-called Executive Session with only the regular, normal complement of the Division present. That is why all public members, and the referee, were excluded from the Board Room when the motion was entertained by this Division on May 13 as alleged in the Bill of Complaint. Therefore, it is the opinion of the Carrier Members that when this Division, with its normal complement, refused to observe its duty under section 3(j) of the Act as explained in the answer to Query (a), the answer to Query (b) must be that the question of giving notice is not now an issue before the referee.

Respectfully submitted for Carrier Members, by J. E. Kemp, Chairman.

EXHIBIT 3 TO ANSWER

STATE OF ILLINOIS,
County of Cook, ss:

T. L. Green, being first duly sworn, on oath deposes and says that,

1. He is Chairman of the First Division of the National Railroad Adjustment Board, with offices at 39 South La-Salle Street, Chicago, Illinois.

2. Notices to appear and participate in proceedings before the Board, as required by Section 3 (j) of the Railway Labor Act, have been given to employees when the employees' position might be adversely affected or when the interpretation of a collective bargaining agreement might affect their rights, in Docket No. 22895 and Docket No. 30074, Appendices A and B, attached hereto.

Further affiant sayeth not.

T. L. Green.

Subscribed and sworn to before me this 29 day of June, A. D. 1953. Vera L. Stang, Notary Public.

[fol. 27] EXHIBIT 3—APPENDIX A

National Railroad Adjustment Board, First Division

39 South La Salle Street, Chicago 3, Illinois
Telephone: Andover 3-1050

October 26, 1951

Registered Mail—Return Receipt Requested.
Mr. Richard Plum,
% Chicago, Aurora & Elgin Railway Company,
400 North Liberty Drive,

Wheaton, Illinois.
DEAR MR. PLUM:

Enclosed is one copy of each ex parte submission by the parties to the dispute in Docket 22895, consisting of "Claim

that the name of R. Plum be removed from the Conductor's Seniority Roster", Chicago, Aurora and Elgin Railway Company.

This is to notify you that you may, within thirty (30) days from the date of receipt of this letter, file a response to the submission or signify your desire for an oral hearing.

By direction of the Division.

Yours very truly, J. M. MacLeod, Executive Secretary.

EXHIBIT 3—APPENDIX B

National Railroad Adjustment Board, First Division

39 South La Salle Street, Chicago 3, Illinois
Telephone: Andover 3-1050

November 14, 1952

Copy

Registered Mail—Return Receipt Requested.
Mr. Milton P. Hanson,
2826 Hamilton Street,
LaCrosse, Wisconsin.

DEAR MR. HANSON:

Enclosed is a copy of joint submission by the parties to the dispute in our Docket 30074, consisting of "Demand [fol. 28] for Removal of Fireman Milton P. Hanson, LaCrosse Division from service of the Chicago, Burlington and Quincy Railroad account not maintaining membership in the Brotherhood of Locomotive Firemen and Enginemen as required by the provisions of the Union Shop Agreement, effective August 16, 1951 * * * ".

This is to notify you that you may, within (30) days from date of receipt of this letter, (1) file a response to the submission and (2) signify your desire to appear at oral hearing.

The hearing of this case, scheduled for 2:00 P. M., No-

vember 12, 1952 has been postponed to 10:00 A. M. December 15, 1952.

By direction of the Division.

Yours very truly, (S.) J. M. MacLeod, Executive Secretary.

EXHIBIT 4 TO ANSWER

"DEPARTMENT OF JUSTICE
Washington, D. C.

May 11, 1951.

"HGM-JEK
124-23-27

"Mr. A. I. Tummon, Acting Secretary,
National Railroad Adjustment Board, Third Division,
220 S. State St.,
Chicago 4, Illinois.

"DEAR MR. TUMMON:

"This will reply to your letter of April 12, 1951, in which you state that Otto Kerner, Jr., United States Attorney, informed you that this Department was not in a position to represent the Third Division of your Board in the defense of the action of *Fran Allain, et al.*, v. *National Railroad Adjustment Board, Third Division, et al.*, 51 C 238, pending in the United States District Court for the Northern District of Illinois, Eastern Division. We note that you asked us to advise you the reason why we cannot represent you in this case.

"It appears that this is a class action brought by plaintiffs against the Third Division of your Board, its members and referee, the Brotherhood of Railroad Trainmen and the Western Pacific Railroad Company to set aside an [fol. 29] order of the Board under which the Western Pacific was ordered to employ dining car stewards as lounge car attendants in place of these plaintiffs, as a result of which the plaintiffs were required to accept less remunerative positions. It also appears that the plaintiffs had occupied the position of lounge car attendants for, on the average, several years and were relatively few in number.

"The pleadings and the findings of the Court disclose that none of the plaintiffs nor the Cooks and Waiters' Union, Local 456 (the certified collective bargaining agent of plaintiffs) were given notice of the pendency of the proceedings before the Board preceding the entry of this order, or were informed of any waiver by the parties of an oral hearing, and that none of them actually had knowledge of these matters. This information is confirmed in a communication to us by Mr. Kerner. It is, therefore, our opinion that these employees were deprived of their position without regard to their constitutional rights and it is not thought that this Department should defend an order having that effect. As you probably know, similar orders of the National Railroad Adjustment Board in several cases have been held to be void for failure to give notice to aggrieved employees. In *Griffin* v. *Chicago Union Station, et al.*, 13 F. Supp. 722, the United States District Court for the Northern District of Illinois so held. At that time the Department refused to join in the appeal on the ground that it believed the District Court's decision to be correct. The judgment of the District Court was affirmed by the Court of Appeals for the Seventh Circuit, sitting in Chicago, in *Nord* v. *Griffin*, 86 F. 2nd 481, and the Supreme Court refused to review the case (300 U. S. 673). Subsequently, the Seventh Circuit has twice reaffirmed its holding in the Nord case. (*Railroad Yardmasters of North America, et al.* v. *Indiana Harbor Co., et al.*, 166 F. 2d 326, affirming judgment of the District Court for the Northern District of Indiana, 70 F. Supp., 914, and *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.* 171 F. 2d 594, certiorari denied 337 U. S. 916, affirming judgment of the District Court for the Northern District of Illinois, 78 F. Supp. 984). Courts of appeals for other circuits have uniformly reached the same conclusion. See *Brotherhood of Railroad Trainmen* v. *Templeton* (C. A. 8) 181 F. 2d 527, certiorari denied 340 U. S. 823; *Estes* v. *Union Terminal Co.* (C. A. 5) 89 F. 2d 768; *Mary Kirby* v. *Pennsylvania R. Co.* (C. A. 3) decided April 23, 1951. Furthermore, in a brief filed by the Govern-[fol. 30-41] ment in the Supreme Court in another case, it was clearly implied that the decision in *Nord* v. *Griffin*, referred to above, was correct, and the reasoning of the

Supreme Court in its subsequent decision in *Elgin, Joliet and Eastern R. Co.* v. *Burley*, 325 U. S. 711 indicates plainly that individual employees have rights of separate representation before the Adjustment Board.

"It is thus clear that the courts have definitely determined that aggrieved individuals are entitled to notice in cases before the Adjustment Board, and that when such notice is not given, the Board's order is void. Since we think these decisions are entirely sound, we could not make a contrary contention on your behalf. We are not suggesting that you obtain private counsel in support of what we believe to be an erroneous and hopeless position. But if this Department appears on your behalf, it would necessarily confess error in the case.

"The position that we take in this matter, is, as is indicated above, not one of first impression. Not only did this Department refuse to join in the appeal of the *Griffin* case, but it appears that the Department did not represent the Board in any other case referred to above in which the Board was a party, nor did it defend the Board's order in any of these cases in which the Board was not a party.

Sincerely yours, (S.) H. G. Morison, Assistant Attorney General.

cc: Otto Kerner, Jr., United States Attorney".

[fol. 42] EXHIBIT 6 TO ANSWER

Affidavit of C. P. Dugan

STATE OF ILLINOIS,
County of Cook, ss:

C. P. Dugan, being first duly sworn, on oath deposes and says that,

1. He is a Carrier Member of the Third Division of the National Railroad Adjustment Board, with offices at 220 South State Street, Chicago, Illinois.

2. The National Railroad Adjustment Board, Third Division, permits only parties or persons receiving due no-

tice from the Board, pursuant to Section 2(j) of the Railway Labor Act, to participate in proceedings before the Board.

3. The Board does not permit persons having merely actual notice of proceedings before the Board to participate therein.

4. It is the practice of the Third Division to consider matters of procedure in executive session at which only the regular 10 members and the Secretary of this Division are [fol. 43] permitted to be present and at which only the regular 10 members are permitted to vote.

Further affiant sayeth not.

C. P. Dugan. (Seal.)

Subscribed and Sworn to before me this 29th day of June, A. D. 1953. Irma Verch, Notary Public. (Seal.)

IN UNITED STATES DISTRICT COURT

AMENDED BILL OF COMPLAINT—Filed June 30, 1953

Now comes the plaintiff, Illinois Central Railroad Company, and presents this, its Amended Bill of Complaint, against defendants, National Railroad Adjustment Board, Third Division, and William H. Castle, R. M. Butler, Claude R. Barnes, C. P. Dugan, J. W. Whitehouse, E. T. Horsley, J. E. Kemp, G. Orndorff, R. Sarchet and J. H. Sylvester, as members of and constituting the Third Division of said [fol. 44] Board, and Donald F. McMahon, acting as Referee and Member of said Board by direction of the National Mediation Board, and for cause of action says that:

I. The plaintiff, Illinois Central Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois and has been for many years past and is now engaged in operating a railroad in, into and through the State of Illinois and other states and has been and is a common carrier of freight and passengers by railroad within the State of Illinois and between points in the State of Illinois and in other states, and that said Railroad Company has its principal place of

business in the City of Chicago, County of Cook, State of Illinois.

II. Defendant National Railroad Adjustment Board, Third Division (hereinafter referred to as the Board), is an administrative body created by an act of Congress entitled "Railway Labor Act," 45 U. S. C. A., § 151 et seq., enacted May 20, 1926, as amended June 21, 1934, and has its principal office at 220 South State Street, City of Chicago, State of Illinois, in the Northern District of Illinois, Eastern Division.

III. Defendants William H. Castle, R. M. Butler, Claude R. Barnes, C. P. Dugan, J. W. Whitehouse, E. T. Horsley, J. E. Kemp, G. Orndorff, R. Sarchet and J. H. Sylvester are the duly selected, qualified and acting members of the Board, having individual and collective offices at 220 South State Street in the City of Chicago, State of Illinois, in the Northern District of Illinois, Eastern Division.

IV. Defendant Donald F. McMahon is a Referee selected by the National Mediation Board pursuant to § 3 First (1) of the Railway Labor Act [45 U. S. C. A., § 153 First (1)] and assigned to the Third Division of the Board, where he acts as a member thereof for the purpose of disposing of certain controversies which have been certified to the National Mediation Board for disposition; and while acting in the aforesaid capacity, defendant Donald F. McMahon has as his principal office the office of the Board at 220 South State Street in the City of Chicago, State of Illinois, in the Northern District of Illinois, Eastern Division.

V. This action is of a civil nature in equity and is a suit arising under the Constitution and laws of the United States, and the matter in controversy exceeds, exclusive of [fol. 45] interest and costs, the sum of $3,000 and jurisdiction is vested in this Court by virtue of the provisions of Title 28 U. S. C. A., § 1337. By this suit plaintiff seeks a mandatory order requiring defendants, before proceeding further, to forthwith serve notice of the claim hereinafter more specifically set forth on all parties involved (who are necessary parties to said claim), as provided for in § 3(p) of the Railway Labor Act [45 U. S. C. A., § 153(j)], which provides that the Board "shall give due notice of all hearings to the employee or employees * * * involved in any dispute submitted to them," or, in the alternative, enjoin-

ing the Board from persisting in its refusal to serve notice of said claim upon all individuals whose employment rights may be affected by a disposition of such claim and from further proceeding with said dispute unless and until said Board has complied with the mandatory requirements of § 3(j) of the Railway Labor Act.

VI. There is presently pending before the Board a proceeding instituted on, to wit, June 12, 1951, by the Order of Railroad Telegraphers against plaintiff herein, entitled "*The Order of Railroad Telegraphers* v. *Illinois Central Railroad Company*," Docket No. TE-5722, which proceeding involves the employment rights of certain employees in and to a position at Palestine, Illinois, presently filled by D. A. Shears of 708 North Howard Street, Robinson, Illinois, who is a member of the craft represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as Clerks). The employment rights of the said D. A. Shears and the members of the craft represented by the Clerks will necessarily be affected and are involved in said dispute presently pending before the Board. Neither the said D. A. Shears, the said Clerks nor any member of the craft represented by the Clerks has been served with notice of said proceeding pursuant to the requirements of § 3(j) of the Railway Labor Act. [45 U. S. C. A., § 153(j)].

VII. That on, to wit, August 11, 1951, plaintiff herein, being the carrier involved in said dispute, filed its submission with the Board specifically setting forth, among other things, that the position involved was at the time occupied by William E. McDaniel, a clerk; that the work in question was plain, ordinary clerical work of the type customarily performed by clerical forces on this carrier and in the industry; and that the claim was in reality one between the Order of Railroad Telegraphers and the Clerks and should [fol. 46] be dismissed unless the Board gave each organization an opportunity to present its side of the case.

VIII. That on, to-wit, May 13, 1953, said dispute, Docket No. TE-5722, came on for hearing before the Board with the Referee sitting as a member at a regular session thereof and on said occasion E. T. Horsley, a defendant herein and one of the members of said Board, upon ascertaining that no notice had been sent out to the Clerks or to mem-

bers of the craft represented by said Clerks who are directly involved in said suit, objected to further proceedings before the Board for the reason due notice had not been given the employees involved. That thereupon the public session was adjourned and said objection was considered by the regular members of the Board in executive session. That in the consideration of such matters it was and is the custom and practice of the Third Division to exclude the Referee and to limit the consideration and the vote on such matters to the regular members of the Division. That although the Referee was sitting at this time as a member of the Board for the purpose of considering the dispute in Docket No. TE-5722, said Referee, in accordance with the Division's custom and practice, was excluded from participating in the consideration of the said E. T. Horsley's objection as to lack of proper notice. That thereafter, on the same day, the public session was reconvened and said E. T. Horsley announced in open session that his objection as to want of jurisdiction had resulted in a tie vote of the Board and was therefore lost. That in recognition of the prevailing custom and practice the said Referee was not requested by the Board or by any member thereof, nor did he request an opportunity, to vote on the question of notice raised by the objection although he was in attendance at the time said objection was made and at the time the announcement was made that the objection as to want of jurisdiction had resulted in a tie vote. That the said E. T. Horsley thereupon, the said Referee being present and sitting as such Referee objected to further proceedings in said matter until the Board had complied with the mandate of § 3(j) of the Railway Labor Act [45 U. S. C. A., § 153(j)] with reference to the giving of notice to parties involved. That, notwithstanding said objection and the positive mandate of the statute, the hearing was resumed with the acquiescence of the Referee on said date, and plaintiff charges [fol. 47] that the Board does not intend to and that it will not give the statutory notice to the Clerks and to the said D. A. Shears, or to either of them, and avers that further demand that the Board or any of the said defendants do so would be unavailing. Plaintiff further avers that the Board will hold further proceedings in said matter without complying with the mandatory requirements of the statute

concerning notice to involved parties unless said action is enjoined by this Honorable Court.

IX. Plaintiff therefore charges the fact to be that, irrespective of the requirements of § 3(j) of the Railway Labor Act, the Board has refused and continues to refuse to serve notice of the proceeding upon the Clerks and upon D. A. Shears, or either of them.

X. This arbitrary action of the Board is taken in the face of and with complete disregard of the requirements of said statute and of the numerous decisions by this Honorable Court and other Federal courts which interpret § 3(j) of the Railway Labor Act as requiring that notice of a proceeding be given to all individuals whose employment rights may be adversely affected or involved by the decision to be rendered by the Board. Plaintiff further alleges that for several years last past the Board has continuously and deliberately pursued, and continues to pursue, a custom and practice of denying the right of participation in any claim pending before it to any party or employee involved but not formally served with notice of the proceeding. That said custom and practice excludes employees and unions other than the one filing the claim with the Board and those seeking to represent them from participating in hearings before the Board. As recently as May 6, 1953, in the case of *Frank Allain, et al.* v. *National Railroad Adjustment Board, Third Division, et al.*, Civil Action No. 51-C-238, this Honorable Court found as a conclusion of law that:

"The long-continued practice of the National Railroad Adjustment Board Third Division, of denying to individuals involved in disputes before the Board their statutory and constitutional rights to participate in the hearing before the Board, constitutes a violation of rights guaranteed said individuals by the Railway Labor Act and the Fifth Amendment to the Constitution of the United States, and this is so without regard to whether or not said individuals may have received formal notice from the Board or may have otherwise acquired knowledge of said proceeding."

[fol. 48] XI. Plaintiff has been informed in writing by the General Chairman of the Clerks, and charges, that in the event the employment rights of members of the Clerks are adversely affected by the claim filed in said Docket No. TE-

5722 before the Board, the Clerks will present and prosecute to the fullest extent a claim against plaintiff based upon the same employment rights which are involved in said proceeding before the Board. If the Board persists in its failure to comply with the requirements of § 3(j) of the Railway Labor Act, plaintiff will be continuously burdened by multiple suits and vexatious legal proceedings.

XII. Plaintiff further alleges that in the event the Board should proceed with a disposition of the claim of the Order of Railroad Telegraphers, docketed as No. TE-5722, without serving notice on the Clerks and find that the employment rights of the position presently held by members of the Clerks properly belong to the members of the Order of Railroad Telegraphers, such a finding would not adjudicate the rights of the Clerks and would not preclude the Clerks from prosecuting an independent right of action under the Railway Labor Act against plaintiff. If the Board should decide such subsequent independent claim was valid, plaintiff would be forced to make payments to both organizations for the same position although the services of the members of only one of the organizations were actually used.

XIII. Plaintiff further alleges that the public policy of the United States of America (as evidenced by § 3(j) of the Railway Labor Act) with respect to the conduct of labor relations between common carriers by railroad and their employees is to dispose of the claims of all individuals whose employment rights may be adversely affected by a decision in a single proceeding before the Board; and that the best interests of the public will be served by the enforcement of said declared policy and by the enforcement of the requirements of § 3(j) of the Railway Labor Act.

XIV. Plaintiff further alleges that it is without an adequate remedy at law; and that it will suffer substantial and irreparable injury and damage, and that such irreparable injury and damage will continue unless the defendants be enjoined from violating and ignoring the plain provisions of § 3(j) of the Railway Labor Act with respect to the service of notice upon the employee or employees whose em- [fol. 49] ployment rights may be adversely affected or involved in a claim pending before the Board.

Wherefore, plaintiff prays that the Court issue a preliminary restraining order and a temporary injunction to be made pemanent on final hearing:

(1) Directing the defendants, and each of them, to forthwith serve or cause to be served due notice of the claim filed against plaintiff by the Order of Railroad Telegraphers in Docket No. TE-5722 before the National Adjustment Board, Third Division, upon D. A. Shears, 708 North Howard Street, Robinson Illinois and upon the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets Cincinnati, Ohio, as required by § 3(j) of the Railway Labor Act [45 U. S. C. A., § 153(j)];

(2) Restraining and enjoining the defendants herein, and each of them, from proceeding with any disposition of said claim until such due notice has been served upon D. A. Shears, 708 North Howard Street, Robinson, Illinois, and upon the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets, Cincinnati, Ohio;

or, in the alternative,

(3) Restraining and enjoining the defendants, and each of them, from persisting in their refusal to serve notice of said claim upon D. A. Shears, 708 North Howard Street, Robinson, Illinois, and upon the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets Cincinnati, Ohio;

(4) Restraining and enjoining the defendants, and each of them, from proceeding with any disposition of said claim until such due notice has been served upon D. A. Shears, 708 North Howard Street, Robinson, Illinois, and upon the Brotherhood of Railway and Steamship Clerks, Freight Handlers Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets, Cincinnati, Ohio;

and plaintiff further prays that on final hearing of this cause it may have judgment for the costs suffered as a result of the wrongful acts of the defendants hereinbefore referred to

[fol. 50] and for such other and further relief as in equity and good conscience to the Court shall seem meet.

Respectfully submitted, Illinois Central Railroad Company, by E. H. Hallmann, Manager of Personnel.

Duly sworn to by E. H. Hallmann. Jurat omitted in printing.

[fols. 51-64] In The United States District Court

Motion to Dismiss—Filed June 30, 1953

Comes now the defendants National Railroad Adjustment Board, Third Division, as an agency created by the Railway Labor Act (45 U. S. C. 151, et seq.) and Donald F. McMahon, acting as referee and member of National Adjustment Board, Third Division, by direction of the National Mediation Board and the United States of America, the latter being the real party in interest under the Railway Labor Act, and on which service was made in accordance with Rule 4(d) (4) and (5) of the Federal Rules of Civil Procedure, by their undersigned attorneys, acting under the direction of the Attorney General and move the Court as follows:

1. To dismiss the action because the complaint on its face shows that it is prematurely brought.

2. To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted, in that it appears on the fact of the complaint that (a) the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees have actual notice of the pendency of the proceeding before the National Railroad Adjustment Board, Third Division, entitled "The Order of Railroad Telegraphers *vs.* Illinois Central Railroad Company, Docket No. TE-5722," (b) plaintiff has adequate remedies, administrative and judicial, to reach the alleged wrong with respect to which it complains (c)

plaintiff is not threatened with any irreparable injury arising out of any action of the defendants herein.

Otto Kerner, Jr., United States Attorney; ——, ——, Assistant United States Attorney; James E. Kilday, Frank F. Vesper, Special Assistants to the Attorney General.

[fols. 65-66] IN THE UNITED STATES DISTRICT COURT

Transcript of Proceedings—Filed July 15, 1953

had in the above-entitled case taken before the Hon. Michael L. Igoe, one of the Judges of said Court, without a jury, in his court room in the United States Court House at Chicago, Illinois, on Friday, July 3, 1953, at 10:00 o'clock a. m.

APPEARANCES

Mr. Herbert J. Deany, Mr. John W. Foster, and Mr. Charles I. Hopkins, Jr., Representing the Plaintiff.

Hon. Otto Kerner, Jr., United States District Attorney, by Mr. John P. Lulinski, Asst. Dist. Atty., Representing the United States of America.

Messrs. Schoene and Kramer, by Mr. Milton Kramer, and Mr. Mozart G. Ratner, Representing Order of Railroad Telegraphers, and the Five Labor Members of the Board.

Messrs. Sidley, Austin, Burgess & Smith, by Mr. Kenneth F. Burgess, Mr. Douglas F. Smith, Mr. Robert Thomas, and Mr. Walter J. Cummings, Jr., Representing Defendants William H. Castle, R. M. Butler, C. P. Dugan, E. T. Horsley, and J. E. Kemp.

[fols. 67-74] Mr. Kramer: We admit some and deny some and allege additional facts.

The Court: What is that?

Mr. Kramer: Allege actual knowledge by the other party. We allege the existence of the fact the other party is governed by a contract of his own.

The Court: As far as the actual knowledge is concerned, I don't think that makes any difference.

Mr. Deany: That is not controverted, the actual knowledge of the Clerks.

[fol. 75] Mr. Kramer: The same as to paragraph 5 but in addition in paragraph 5 on the top line of page 6 they say:

"—of the proceeding is a denial of due process of law—"

I think there should be inserted: to whom it is a denial——

Mr. Foster: It is a denial of due process to the one occupying the job at Palestine, and to the clerks' organization of which he is a member.

The Court: That is what they are talking about.

Mr. Kramer: If that is what it means, I think it should be explicit, if that is a denial of the individual's rights.

The Court: That is what they say. They are referring to the denial of the individuals or the organization.

[fols. 76-79] Mr. Kramer: Let it be understood then that is the meaning.

The Court: Yes, sir.

[fol. 80] In the United States District Court

Findings of Fact and Conclusions of Law—July 3, 1953

This cause coming on to be heard on plaintiff's motion for a mandatory order requiring defendants to forthwith serve notice of a proceeding before the Third Division, National Railroad Adjustment Board, upon the employees involved in said proceeding, and the court having considered the verified amended complaint heretofore filed in this case, the answers filed by some individual defendants and the verified exhibits attached thereto and the answer of the intervening defendant, The Order of Railroad Telegraphers motions to dismiss and memorandum briefs filed in support thereof and in opposition thereto, and the arguments of counsel, does find the facts and does order, adjudge and decree as follows:

Findings of Fact

1. Plaintiff, Illinois Central Railroad Company, is a corporation organized and existing under and by virtue of the laws of the State of Illinois, having its principal office and place of business in Chicago, Illinois, and is engaged in operating a railroad in, into and through the State of Illinois and other states.

2. Defendant National Railroad Adjustment Board, Third Division, is an administrative body created by an Act of Congress entitled "Railway Labor Act," 45 U. S. C., §§ 151 *et seq.*, and has its principal office at 220 South State Street, Chicago, Illinois.

3. Defendants William H. Castle, R. M. Butler, Claude R. Barnes, C. P. Dugan, J. W. Whitehouse, E. T. Horsley, J. E. Kemp, G. Orndorff, R. Sarchett and J. H. Sylvester are the duly designated members of the Third Division, National Railroad Adjustment Board, and said Board has its principal office and place of business in Chicago, Illinois.

4. Defendant Donald F. McMahon is a referee selected by the National Mediation Board pursuant to § 3, First (1) of the Railway Labor Act [45 U. S. C., § 153, First (1)] and assigned to the Third Division of the Board, where he acts as a member thereof for the purpose of making an award in certain cases before the Third Division in which [fol. 81] said Division has been unable to reach a decision. One of such cases to which defendant Donald F. McMahon is assigned is Docket No. TE-5722.

5. Said Docket No. TE-5722 is a proceeding instituted by the Order of Railroad Telegraphers against plaintiff herein, entitled "The Order of Railroad Telegraphers *vs.* Illinois Central Railroad Company," which proceeding involves the employment rights of certain employees in and to a position at Palestine, Illinois. The position is presently filled by D. A. Shears of 708 North Howard Street, Robinson, Illinois, who is a member of the craft represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. The employment rights of the said D. A. Shears and the members of the craft represented by the Clerks will necessarily be affected and are involved in the proceeding pending before the Third Division of the Adjustment Board.

6. Plaintiff herein has filed a "submission" with the Board which is in the nature of an answer to the complaint of the Telegraphers specifically setting forth, among other things, that the position involved was at that time occupied by William E. McDaniel, a clerk, that the work in question was plain, ordinary clerical work of the type customarily performed by clerical forces on plaintiff's property and in the railroad industry generally, and that the claim was in

reality one between the Telegraphers and the Clerks and should be dismissed unless the Board gave each organization an opportunity to present its side of the case.

7. Notice of the proceeding before the Third Division has not been served upon D. A. Shears, the present incumbent of the position involved, nor does it appear in the record of this proceeding that the said D. A. Shears has actual knowledge thereof.

8. Formal notice of the proceeding before the Third Division has not been served upon the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees or the constituents thereof.

9. On May 13, 1953, Docket No. TE-5722 came on for hearing before the Board, with Referee McMahon sitting as a member, at a regular session thereof. On said occasion E. T. Horsley, a defendant herein and one of the members of said Board, upon ascertaining that no notice had been given to the Clerks or to members of the craft represented by the Clerks, objected to further proceedings before the Board for the reason due notice had not been given. [fol. 82] Thereupon the public session was adjourned and the objection was considered by the regular members of the Board in executive session. In accordance with the custom and practice of the Third Division, Referee McMahon was excluded from the consideration and vote on the objection. Thereafter, on the same day, the public session was reconvened and the said E. T. Horsley announced in open session that his objection had resulted in a tie vote of the Board and was therefore lost. Referee McMahon was not requested by the Board or by any member thereof, nor did he request an opportunity, to vote on the question of notice raised by the objection although he was in attendance at the time the objection was made and at the time the announcement was made that the objection as to want of jurisdiction had resulted in a tie vote. The said E. T. Horsley, in the presence of Referee McMahon, objected to further proceedings in Docket No. TE-5722 until the Board had complied with the mandate of § 3, First (j) of the Railway Labor Act with reference to the giving of notice to the employees involved. Notwithstanding said objection and the requirement of the statute, the hearing was resumed on said date with the acquiescence of the referee.

10. Plaintiff herein has been informed in writing by the General Chairman of the Clerks that in the event the employment rights of members of the Clerks are adversely affected by the claim filed in Docket No. TE-5722, the Clerks will present and prosecute to the fullest possible extent a claim against plaintiff based upon the same employment rights as are involved in the proceeding before the Board.

11. The Third Division of the National Railroad Adjustment Board has for several years continuously pursued, and continues to pursue, a custom and practice of denying to individuals involved in disputes before the Board their statutory and constitutional rights to participate in the hearings before the Board if said individuals have not been formally served with notice of the proceeding.

12. Section 3, First (j) of the Railway Labor Act provides:

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them."

[fol. 83] 13. The cause of action here asserted by plaintiff is one arising out of an Act of Congress regulating commerce, and the court has jurisdiction of the parties and the subject matter of said cause under § 1337, Title 28, U. S. Code, and venue is properly in this court.

Conclusions of Law

Under the foregoing findings of fact, the Court concludes that:

1. The cause of action here asserted by plaintiff is one arising out of an Act of Congress Regulating Commerce; and the Court has jurisdiction of the parties and subject-matter of said cause under Section 1337, Title 28, United States Code, and venue is properly in this Court.

2. The Amended Complaint herein states a claim upon which relief should be granted.

3. D. A. Shears, the individual presently filling the position at Palestine, Illinois, and the organization repre-

senting the craft of which said individual is a member, are "employees involved" in Docket No. TE-5722 before the Third Division of the National Railroad Adjustment Board within the meaning of Section 3 First (j) of the Railway Labor Act.

4. The Third Division, National Railroad Adjustment Board, in failing to give due notice of any and all hearings or proceedings in said Docket TE-5722 has failed and neglected to accord the individual presently filling the position at Palestine, Illinois, which is in controversy in said Docket, and the organization representing the craft of which he is a member, due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

5. The custom and practice of the National Railroad Adjustment Board, Third Division, of denying to individuals and organizations involved in disputes before the Board their statutory and constitutional rights to participate in the hearings before the Board if they have not been formally served with notice of the proceeding is a denial of due process of law in contravention of the Fifth Amendment.

6. The failure of the Third Division, National Railroad Adjustment Board, to serve notice of the hearings or proceedings in Docket No. TE-5722 upon the individual presently filling the position in controversy and upon the [fol. 84] organization representing the craft of which he is a member, is a dereliction of the duty imposed upon said Board by the mandatory requirements of Section 3 First (j) of the Railway Labor Act.

7. The Railway Labor Act imposes upon the various Divisions of the National Railroad Adjustment Board the duty of serving notice of any proceeding before it upon all employees involved irrespective of whether such employees are members of the craft or class filing the claim with the Board.

8. The notice required by Section 3 First (j) of the Railway Labor Act is jurisdictional and if the Board fails to comply with this Section of the statute it is acting without statutory authority. The National Railroad Adjustment Board may not assert its general power under the Railway Labor Act and at the same time disregard the essential conditions imposed upon it by Congress for the exercise of such power.

9. Plaintiff has no adequate remedy at law and will suffer irreparable harm and injury unless defendants are required to comply with the provisions of the Railway Labor Act. The failure of the Board to serve the required notice will involve plaintiff in multifarious litigation. The equity powers of this Court are adequate to afford the relief herein sought by means of a mandatory injunction and should be exercised in the circumstances herein referred to.

10. This cause does not involve a labor dispute within the meaning of the Norris-LaGuardia Act and this Court has not been deprived of jurisdiction to grant the relief requested herein.

11. The motion of the defendant, National Railroad Adjustment Board, Third Division, and of Donald F. McMahon as Referee and member of the National Railroad Adjustment Board, Third Division, is not well founded in law and is denied.

12. The motion of the defendants, J. W. Whitehouse, G. Orndorff, J. H. Sylvester, Claude R. Barnes and R. Sarchett, to dismiss is not well founded in law and is denied.

13. A preliminary injunction should be issued enjoining the defendants from further proceeding in Docket No. TE-5722, unless and until they give formal notice to D. A. Shears, 708 North Howard Street, Robinson, Illinois, and the Brotherhood of Railway and Steamship Clerks, Freight [fol. 85] Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets, Cincinnati, Ohio, and permit said persons to participate in proceedings before the Board in Docket No. TE-5722.

PRELIMINARY INJUNCTION

This matter coming on to be heard on plaintiff's application for a preliminary injunction and the Court having considered the verified Amended Complaint heretofore filed in this case, the answers filed by some individual defendants and the verified exhibits attached thereto, and the answer of the intervening defendant, The Order of Railroad Telegraphers, motions to dismiss and memorandum briefs filed in support thereof and in opposition thereto, and the arguments of counsel and the entire record herein, and the

Court having made findings of fact and conclusions of law as above set forth,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the motion to dismiss heretofore filed herein by the defendants, National Railroad Adjustment Board, Third Division, as an agency created by the Railway Labor Act (45 U. S. C. 151, et seq.) and Donald F. McMahon, acting as Referee and member of National Railroad Adjustment Board, Third Division, be and the same is hereby denied.

It Is Further Ordered, Adjudged and Decreed that the motion of the defendants, J. W. Whitehouse, G. Orndorff, R. Sarchett, and Claude R. Barnes, to dismiss, be and the same is hereby denied.

It Is Further Ordered, Adjudged and Decreed that the defendants, National Railroad Adjustment Board, Third Division, and William H. Castle, R. M. Butler, Claude R. Barnes, C. P. Dugan, J. W. Whitehouse, E. T. Horsley, J. E. Kemp, G. Orndorff, R. Sarchett and J. H. Sylvester, as members of and constituting the Third Division of said Board, and Donald F. McMahon, acting as Referee and Member of said Board by direction of the National Mediation Board, are enjoined from proceeding in Docket No. TE-5722 before the National Railroad Adjustment Board, Third Division, unless and until they give formal notice to D. A. Shears, 708 North Howard Street, Robinson, Illinois, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets, Cincinnati, [fols. 86-88] Ohio, and permit said persons to participate in the proceedings in said Docket No. TE-5722.

It is further ordered that said preliminary injunction is conditioned upon the filing by the plaintiff within five days of bond in the sum of Five Hundred Dollars ($500.00).

And it is further Ordered that said preliminary injunction be and it hereby is stayed pending appeal to be filed thirty (30) days after the date hereof.

Enter: Igoe, Judge.

July 3, 1953.

[fols. 89-103] IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 30, 1953

Notice is hereby given that J. W. Whitehouse, G. Orndorff, J. H. Sylvester, Claude R. Barnes and R. Sarchett, and The Order of Railroad Telegraphers, defendants above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the order enjoining the defendant members of the Third Division of the National Railroad Adjustment Board from proceeding in Docket No. TE-5722 before said Board, unless and until they give formal notice to D. A. Shears, and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and permit said person to participate in the proceedings in said Docket No. TE-5722, entered in this action on July 3, 1953.

Mozart G. Ratner, Milton Kramer, Attorneys for Appellents, J. W. Whitehouse, G. Orndorff, J. H. Sylvester, Claude Barnes, R. Sarchett and The Order of Railroad Telegraphers.

Jacobs, Kamin & Ratner, 201 N. Wells Street, Chicago 6, Illinois; Schoene & Kramer, 1625 K Street, N. W., Washington 6, D. C.

At a regular term of the United States Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the sixth day of October, in the year of our Lord one thousand nine hundred and fifty-three, and of our Independence the one hundred and seventy-eighth.

Illinois Central Railroad Company, *Plaintiff-Appellee,* 10959 *vs.* J. W. Whitehouse, G. Orndorff, J. H. Sylvester, Claude R. Barnes, R. Sarchett and The Order of Railroad Telegraphers, *Defendants-Appellants,* and William H. Castle, R. M. Butler, C. P. Dugan, E. T. Horsley and J. E. Kemp, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

And afterwards, to wit: On the second day of December, 1953, the following further proceedings were had and entered of record, to-wit:

Wednesday, December 2, 1953.

Before:

Hon. J. Earl Major, Chief Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. H. Nathan Swaim, Circuit Judge.

Illinois Central Railroad Company, *Plaintiff-Appellee,*		Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
10959	*vs.*	
J. W. Whitehouse, *et al.,* *Defendants-Appellants,* and William H. Castle, *et al.,* *Defendants-Appellees.*		

Now this day come the parties by their Counsel, and this cause comes on to be heard on the transcript of the record and briefs of counsel, and on oral argument by Mr. Milton Kramer, counsel for appellants, and by Mr. John W. Foster, counsel for appellee, Illinois Central Railroad Company, and by Mr. Walter J. Cummings, Jr., counsel for appellees, Carrier Members, National Railroad Adjustment Board, Third Division, and the Court takes this matter under advisement.

And afterwards, to-wit: On the nineteenth day of March, 1954, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 10959 OCTOBER TERM, 1953, JANUARY SESSION, 1954

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff-Appellee,
vs.
J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE R. BARNES, R. SARCHETT AND THE ORDER OF RAILROAD TELEGRAPHERS,
Defendants-Appellants,
and
WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY and J. E. KEMP,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 19, 1954.

Before MAJOR, *Chief Judge*, DUFFY and SWAIM, *Circuit Judges.*

MAJOR, *Chief Judge.* The Order of Railroad Telegraphers (hereinafter referred to as Telegraphers) filed a claim before the National Railroad Adjustment Board, Third Division (hereinafter referred to as the Board), against the Illinois Central Railroad Company (hereinafter referred to as Carrier), asserting that an agreement between the Carrier and Telegraphers covered the work of a position on the property of the Carrier in Palestine,

Illinois, which was then being performed by D. A. Shears, a member of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as Clerks).

After this claim was filed with the Board, the Carrier was informed in writing by the Clerks that in the event the employment rights of the present incumbent of the position in question are adversely affected by the claim filed by the Telegraphers, the Clerks will present and prosecute a claim against the Carrier based upon the same employment rights which are involved in the Telegraphers' proceeding.

Thereafter, the Carrier filed its submission with the Board, stating that the employment in controversy was plain, ordinary clerical work of the type customarily performed by clerical personnel on the Carrier's property and in the industry generally, and that the claim was in reality a dispute between the Telegraphers and the Clerks and should be dismissed unless the Board gave each organization an opportunity to present its side of the case. The ten regular members of the Board, consisting of five carrier members and five labor members, deadlocked on the merits of the Telegraphers' claim, following which a Referee was appointed by the National Mediation Board, pursuant to Sec. 3 First (l) of the Railway Labor Act (45 U. S. C. A. Sec. 153 First (l)), to act as a member of the Board for the purpose of making an award.

On May 13, 1953, the Telegraphers' claim came before the Board for hearing, at which time a question was raised by Mr. Horsley, a carrier member, that no notice had been served on the Clerks or on members of the craft represented by the Clerks "who were directly involved in the claim." A vote was taken on the question of giving notice, which resulted in a tie, the five carrier members voting to give notice and the five labor members against. The Referee abstained from voting. Mr. Horsley thereupon, the said Referee being present, objected to further proceedings in said matter until the Board had complied with Sec. 3 (j) of the Railway Labor Act relative to the giving of notice to parties involved. Notwithstanding this objection, the hearing was resumed, with the Referee present and acquiescing in such action.

On May 22, 1953, the Carrier filed the instant action against the Board, each of the ten individual members of

the Board, and Donald F. McMahon, acting as Referee and member of the Board by direction of the National Mediation Board. The complaint recited in detail the facts outlined above and alleged that "the Board does not intend to and that it will not give the statutory notice to the Clerks and to the said D. A. Shears, or to either of them;" and that further demand that the Board do so would be unavailing and that the Board would hold further proceedings in the matter without giving such notice "unless such action is enjoined" by the court.

The complaint also alleged that "for several years last past the Board has continuously and deliberately pursued, and continues to pursue, a custom and practice of denying the right of participation in any claim pending before it to any party or employee involved but not formally served with notice of the proceeding. That said custom and practice excludes employees and unions other than the one filing the claim with the Board and those seeking to represent them from participating in hearings before the Board." This allegation is supported by the affidavit of a carrier member and is not disputed.

The complaint prayed for "a preliminary restraining order and a temporary injunction to be made permanent on final hearing: (1) Directing the defendants, and each of them, to forthwith serve or cause to be served due notice of the claim filed against plaintiff by the Order of Railroad Telegraphers in Docket No. TE-5722," upon Shears and the Clerks "as required by Section 3 (j) of the Railway Labor Act" (45 U. S. C. A. Sec. 153 (j)), and "(2) Restraining and enjoining the defendants herein, and each of them, from proceeding with any disposition of said claim until such due notice has been served upon" Shears and the Clerks.

Telegraphers as an intervening defendant filed an answer in opposition to the Carrier's motion for a preliminary injunction. This answer alleged lack of jurisdiction by the court to grant injunctive relief for the reason that the judicial review of awards of the Board provided by the Railway Labor Act in actions to enforce is exclusive; that the Carrier has not exhausted its administrative remedies; that the Board, with the Referee sitting as a member thereof, has not made, but will make unless enjoined, a final determination of the Carrier's contentions,

including its contention that any award in favor of Telegraphers would be invalid unless notice is given to the Clerks; that the complaint is premature because the Referee may decide Telegraphers' claim in favor of the Carrier, either on the question of notice or on the merits, in which case the Carrier cannot be injured; that, if the case should be decided in favor of Telegraphers, the Carrier, if correct on its contention as to notice, will have an adequate defense to any suit for enforcement of the award, which defense constitutes an adequate remedy at law; that the Clerks has its own contract with the Carrier governing the performance of work by members of that craft and it is, therefore, neither a necessary nor a proper party in the proceeding before the Board, and, finally, Telegraphers alleged that the record shows that the Clerks had actual knowledge of the pendency of the claim before the Board and that such knowledge dispenses with the necessity of giving formal notice. Telegraphers, therefore, asked that the motion of the Carrier for a preliminary injunction be denied.

The five labor members of the Board also filed an answer, objecting to the granting of a preliminary injunction as sought by the Carrier for substantially the same reasons as those asserted by the Telegraphers, and also filed a motion to dismiss the complaint for reasons similar to those set forth in their answer. The carrier members of the Board answered the complaint and generally agreed with the position of the Carrier as set forth in its complaint.

The Board, the Referee and the "United States of America, the latter being the real party in interest under the Railway Labor Act, and on which service was made in accordance with Rule 4 (d)(4) and (5) of the Federal Rules of Civil Procedure," filed a motion to dismiss the complaint on the grounds that (1) the complaint shows on its face that it is prematurely brought, (2) the complaint fails to state a claim upon which relief can be granted, and (3) plaintiff is not threatened with irreparable injury arising out of any threatened action by the Board.

We discern no substantial dispute as to the facts; at any rate, there is no attack upon the findings as made by the district court, which are predicated upon the pleadings and numerous exhibits attached thereto. The court specifically found that the proceeding before the Board involved

the employment rights of certain employees to a position then held by D. A. Shears, a member of the Clerks' union, and that Shears and the members of the craft represented by the Clerks would be affected by and are involved in the Board proceeding. The court found that no notice of the proceeding had been served upon Shears, that there was nothing in the record to show that he had actual knowledge thereof and that no formal notice had been served upon the Clerks' union or the constituents thereof. The court found: "The Third Division of the National Railroad Adjustment Board has for several years continuously pursued, and continues to pursue, a custom and practice of denying to individuals involved in disputes before the Board their statutory and constitutional rights to participate in the hearings before the Board if said individuals have not been formally served with notice of the proceeding." And the court concluded that such custom and practice "is a denial of due process of law in contravention of the Fifth Amendment," and "The notice required by Section 3 First (j) of the Railway Labor Act is jurisdictional and if the Board fails to comply with this Section of the statute it is acting without statutory authority. The National Railroad Adjustment Board may not assert its general power under the Railway Labor Act and at the same time disregard the essential conditions imposed upon it by Congress for the exercise of such power."

The court denied the motion of the Board and the labor members thereof to dismiss the complaint, and by order enjoined the Board, its members and the Referee from proceeding in Docket No. TE-5722 (this being the Telegraphers' claim in controversy) "unless and until they give formal notice" to D. A. Shears and the Clerks and "permit said persons to participate in the proceedings in said docket."

The appeal is brought to this court by the labor members of the Board and the Telegraphers (designated in the caption of this opinion as defendants-appellants). There was no appeal by the carrier members of the Board (designated in the caption as defendants-appellees), and no appeal by the United States, the real party in interest under the Railway Labor Act.

The issues raised in this court are in substance the same as those pleaded by Telegraphers in its answer to the complaint, heretofore set forth, and need not be repeated. The

explosive nature of the instant controversy revolved around Sec. 3 First (j) of the Railway Labor Act, which provides: "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

There can hardly be any doubt, as the district court found, but that the Clerks and Shears were "involved" parties within the terms of this provision. And it is hardly open to question but that an award made by the Board in the absence of "due notice" to the "involved" parties, with an opportunity accorded to be heard, is void and that its enforcement may be enjoined for that reason. *Nord, et al.* v. *Griffin*, 86 F. 2d 481; *Hunter, et al.* v. *Atchison, T. & S. F. Ry. Co., et al.*, 171 F. 2d 594; same title and case on a second appeal, 188 F. 2d 294, and *Missouri-Kansas-Texas R. Co., et al.* v. *Brotherhood of Ry. and S. S. Clerks, et al.*, 188 F. 2d 302. (These are all decisions by this court.) Further, it is not disputed that the Board refused to give notice to the Clerks and Shears and that it set the case and was about to proceed to a hearing and decision on the merits. Such was the situation when the complaint was filed which resulted in the order under attack, by which the Board, including the Referee, was restrained from proceeding further, in the absence of formal notice to the Clerks and Shears.

As already stated, neither the Board nor the United States has appealed from the order now under attack by Telegraphers, which is understandable in view of the position which they took in the court below. Their motion to dismiss was predicated in the main upon the premise that the action was premature and that the plaintiff was not threatened with irreparable injury. In their brief, however, it was conceded that any award to the Telegraphers entered in the absence of notice to the Clerks and Shears would be void and unenforceable.

The carrier members of the Board attached to their answer the findings and conclusions of the United States District Court for the Northern District of Illinois (Judge Barnes) in civil action No. 51 C 238, entitled "*Allain, et al.* v. *National Railroad Adjustment Board Third Division,*

et al.," where an order of the Board was held void and its enforcement restrained because of its failure to give notice to "employees involved," as required by Sec. 153 First (j) of the Act. Also attached to the answer is a letter written by the Department of Justice, dated May 11, 1951, and directed to the Secretary of the Board, Third Division. The letter states in detail the reason for the refusal of the Attorney General to represent the Board, the substance of which is that it is because of the Board's refusal to give notice to involved parties. The letter states, "It is, therefore, our opinion that these employees were deprived of their position without regard to their constitutional rights and it is not thought that this Department should defend an order having that effect." In support of that position, the Department refers to many cases, including those of this court above cited, and summarizes the situation as follows: "It is thus clear that the courts have definitely determined that aggrieved individuals are entitled to notice in cases before the Adjustment Board, and that when such notice is not given, the Board's order is void. Since we think these decisions are entirely sound, we could not make a contrary contention on your behalf."

Telegraphers in its brief states that the action is premature because "The Board's decision may be in accord with the railroad's contentions." Closely allied with this issue is that the district court was without jurisdiction to grant an injunction "because the railroad has failed to exhaust its administrative remedies." Relative to the former contention, it is argued that the Carrier "may never be hurt by the allegedly improper procedure the Board is following" because the Board, if permitted to decide, "may decide for the railroad on the procedural ground or on the merits or on both. In any such event no harm would be caused to the railroad." It is asserted that the Board, with the Referee sitting as a member, may decide the issues favorably to the railroad and that in fact the Board has, with the Referee sitting as a member, denied a number of awards because of the lack of notice to third parties.

This brings us at once to the contention advanced by the Carrier that the Referee is without authority to participate in a decision as to whom notice shall be served upon but that such determination must be made by the Board as originally constituted. No authority is cited and we know of none where this question has been decided but we are

convinced from our study of the statute that the contention is sound. The first duty or obligation imposed upon the Board after a claim has been filed is that contained in (j) (heretofore quoted). That paragraph contains the unequivocal command that the Board "shall give due notice of all hearings." At that stage of the proceeding, it appears plain that there is no Referee and there could not be, by reason of the subsequent provisions which define the conditions and circumstances under which a Referee may be brought into the proceeding.

Paragraph (l) provides that "upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members," such division shall agree and "select a neutral person, to be known as 'referee,' to sit with the division as a member thereof and make an award." In case the members of the division are unable to agree upon and select a referee then such fact may be certified to the Mediation Board which shall select and name the Referee, "to sit with the division as a member thereof and make an award." It appears certain that paragraph (l), providing for the selection of a Referee, presupposes that the Board has complied with the "due notice" provision of paragraph (j). Moreover, the Referee, whether selected by members of the division or by the Mediation Board, is authorized to sit as a member of the Board only for the purpose of "making an award." His authority to sit as a member for that purpose bears no relation to the obligation imposed upon the Board to give "due notice." That the Board is without power to proceed until it has complied with the "due notice" requirement of paragraph (j) is evidenced by the fact that an award made in the absence of such notice is void, and a study of the relevant provisions of the statute leaves little, if any, room for doubt but that the selection of a Referee is authorized only in the event that the division is deadlocked or unable to agree on the making of an award. In such case, a Referee is selected evidently to break the deadlock or, in the language of the statute, "to sit as a member and make an award." It appears that the Board recognized this limited authority of the Referee because he did not participate or at any rate did not vote on the notice controversy.

Telegraphers in its brief further states, "We cannot assume that the Board will make an erroneous decision.

In any event, until the Board makes its decision the courts are without jurisdiction to advise the Board of the correct decision," and "To be sure, the Board might make a decision that would turn out, on appropriate judicial review, to be wrong. But the mere possibility of an erroneous decision is hardly the basis for enjoining administrative action." This argument, if it can be thus dignified, begs the whole question. It is based on the false assumption that the Board possesses the power to make an award without giving "due notice" and an opportunity to involved parties to be heard. Obviously the court has not and will not advise the Board as to the kind of decision it should make. On that score we at present have no concern. The point is that the Board, under the situation existing, is without power to make any decision, right or wrong. And it must be remembered that the order under review does nothing more than restrain the Board from proceeding until it has complied with the statutory command. When it does that, a hearing may be had and a decision rendered which may be the subject of attack in such manner as is provided for by law.

The only case called to our attention where a restraining order has been issued under circumstances similar to those here is that of *Townsend et al.* v. *National Railroad Adjustment Board, Fourth Division, et al.*, No. 53-C-2287, decided by the United States District Court for the Northern District of Illinois (Judge Campbell) on January 6, 1954. In that case, it was the Fourth Division which refused to give notice under Sec. 153 (j), and the court issued an order in form almost identical to that of the present case. There, as here, the jurisdiction or authority of the court was under attack. The court in an unpublished opinion stated: "Congress has commanded in express terms that the several divisions of the NRAB 'shall give due notice of all hearings to the employee or employees * * involved in any disputes submitted to them;' but Congress has not expressly defined a remedy for employees involved in a dispute who have not been given notice. If a district court lacked jurisdiction to order that notice be given, the 'right' to notice conferred by Section 3 would become mere verbiage, a right without a remedy. Congress could not have intended that result." We think that is a sound statement. True, it was made in a case where the relief sought was by an ag-

grieved employee rather than by the Carrier, as here, but even so, we discern no difference insofar as the jurisdictional issue is concerned.

Moreover, it is generally held that aggrieved parties may under some circumstances restrain action by the Board without an exhaustion of administrative remedies. Such was the holding in the decisions of this court heretofore cited. In *Order of Railway Conductors of America et al.* v. *Pitney et al., etc.*, 326 U. S. 561, it was recognized that a court of equity might interfere in a proper case. True, the court there held that the case presented was not proper, but in doing so stated (page 567), "under these circumstances the court should exercise equitable discretion to give that agency [the Board] the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then." Here, the Board has had an opportunity to pass upon the notice issue and has refused to comply with the statute. Nevertheless, we are urged to hold that it should be permitted to proceed to a hearing and a decision on the merits as a prerequisite to the right of a court of equity to interfere. Thus, a court before it can interfere must sit idly by until the Board has engaged in a mock proceeding. Such reasoning is devoid of all logic. And, as already pointed out, we are not aware of any administrative remedy for the review of an award made by the Board. The only remedy is an attack in court upon such an award either in defense of an enforcement action or by injunction to restrain its enforcement.

We conclude that the court had jurisdiction and that the action was not premature. Closely aligned with these issues and partly covered by our discussion relative thereto is the contention that in any event the Carrier has no standing to institute such an action because it has shown no harm or damage and may never be able to do so, depending upon the decision which the Board makes on the merits. We think this contention is without merit. The Carrier has been involuntarily brought into the proceeding by action of the Board. In order to protect its rights and property, it must resist the Telegraphers' claim by participating in the proceeding. To do so it must expend time, labor and money in a fruitless effort to protect itself from a potential award rendered in a proceeding in which the Board is without jurisdiction. Moreover, the Car-

rier is threatened not only with an abortive proceeding before the Board but by the Clerks in an action concerning the same employment rights. The reasoning in *Kirby et al.* v. *Pennsylvania R. Co.*, 188 F. 2d 793, 799, is pertinent, wherein the court stated: "Until the statutory requirements are met, it [the Board] has no more standing to produce legally effective orders than any voluntary group of citizens. Anyone to be affected by the purported order can raise the point that it has no legal foundation. We conclude that defendant carrier may raise the point that employees involved in the dispute had no notice or knowledge of the hearing, and no opportunity to be heard before the Adjustment Board. A party is entitled to an award that will protect it in the event that it complies."

We think the contention that the action must fail because it is shown that the Clerks had actual notice and that it was the representative of Shears is likewise, under the circumstances, without merit for a number of reasons. It is true that actual notice has been recognized as sufficient in some of the cases where the attack was upon the validity of the award. Here, however, it is sought to be utilized as a justification for the Board's refusal to comply with the statute. More than that, under the statute the employee (Shears) was entitled to notice the same as the Clerks, and it is not shown that he had notice of any kind. Of more importance, however, is the fact that actual notice would have served no purpose insofar as it afforded protection to the Clerks or Shears of either their statutory or constitutional right to be heard because, as the record plainly shows, the Board would not have permitted them to be heard with that kind of notice. A hearing would have been allowed only to those receiving formal notice. Such being the situation, the Board cannot hide behind the pretext that actual notice is sufficient and at the same time say that only those given formal notice will be heard. But it is asserted that the Clerks and Shears had no desire to be heard. Even so, that is beside the issue and no concern of the Board. The point is that the Board must accord the opportunity to be heard. When that has been done, the beneficiary of the right may exercise it or not, as he (or it) sees fit. It is difficult to understand why the Board persists in its refusal to give formal notice when such refusal, as the cases disclose, oftentimes furnishes the basis for protracted litigation. Instead of

serving as an agency for the prompt and expeditious settlement of labor disputes, it lends itself to the incubation of controversy and further dispute.

Telegraphers argues, and we assume it is the Board's position, that the Board is without authority to consider two agreements simultaneously and for that reason notice was not required to be served upon the Clerks or Shears. That contention has been rejected by this court in *Missouri-Kansas-Texas R. Co. et al.* v. *Brotherhood of Ry. & S. S. Clerks et al.*, 188 F. 2d 302. Referring to *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561, this court stated (page 306): "That case also involved a dispute between two groups of employees, both of whom claimed the same jobs by virtue of the agreement of each with the carrier. There the Supreme Court upheld the function of the Adjustment Board to resolve the conflict, but indicated that in doing so, the Board must consider both agreements together, stating 326 U. S. at page 567, 66 S. Ct. at page 325, 'O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood.'"

Lastly, we reiterate that this is not an action to review an erroneous decision of the Board. It is only to require the Board to perform its statutory duty as a prerequisite to its authority to proceed. While it is labeled as an injunctive proceeding, it is more in the nature of mandamus. At any rate, the Board has the choice of two alternatives, (1) proceed no further or (2) comply with the statutory requirement and proceed to a hearing on the merits, with an opportunity for all parties to be heard. The court in *Wilbur* v. *United States*, 281 U. S. 206, 218, made a relevant pronouncement. There the court stated: "Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. * * Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary."

The order appealed from is

AFFIRMED.

SWAIM, *Circuit Judge*, Dissenting. I think that the action in the District Court was premature because the Board had not finally acted on the matter and that, until such final action, the Carrier had not exhausted the administrative remedies provided by the Railway Labor Act, 45 U. S. C. Sec. 151 *et seq.* As the Supreme Court said in *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 767: "The doctrine [of first resorting to administrative remedies], wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion, and, correlatively, of awaiting their final outcome before seeking judicial intervention." This would seem to clearly negative the power of the courts to enjoin the *making* of an award. The Railway Labor Act expressly sets forth the reasons for its enactment. The fifth stated purpose is: "(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." 45 U. S. C. Sec. 151 (a) (5).

If either party to a claim before the Board were privileged to go into court and enjoin further proceedings by the Board each time the Board decided some preliminary matter or took, or failed to take, some procedural step to which the complaining party objected, there would be neither "prompt" nor "orderly" settlement of such disputes, and the above quoted fundamental purpose of the Railway Labor Act would be defeated.

But the Carrier insists that it has been informed in writing by the Clerks that, in the event the rights of members of the Clerks' organization are adversely affected by an award in Docket No. TE-5722, the claim of the Telegraphers, the Clerks will present and prosecute a claim against the Carrier on behalf of any member of the Clerks so affected; that if the Board should proceed with the disposition of the claim of the Telegraphers without serving notice on the Clerks and should find that the work here in dispute belongs to the Telegraphers, such a finding would not adjudicate the rights of the Clerks and would not preclude the Clerks from prosecuting an independent claim under the Railway Labor Act against the plaintiff; that if the Board should then decide such a claim by the Clerks to be valid, the Carrier would be

forced to make payments to both organizations for the same work, although the services of the members of only one of the organizations were actually used; and that the Carrier by such action by the Board would suffer irreparable injury and damage which would continue unless the defendants were enjoined from proceeding without complying with Section 3 First (j) of the Act, 45 U. S. C. Sec. 153 First (j).

I think none of these reasons assigned by the Carrier justified the bringing of this action prior to an award and order by the Board. It is to be noted that neither the Clerks nor Shears are parties to this action. The only party complaining of the action of the Board is the Carrier. If we assume, *arguendo*, that Section 3 First (j) of the Act required notice to the Clerks and to Shears, as the majority opinion holds, it is clear from the record that the Clerks had actual notice, and that the Clerks' organization intends to take whatever action it may consider necessary to protect the rights of Shears under the Clerks' contract with the Carrier. This plainly indicates that there is no misunderstanding between the Clerks and Shears, the individual, and that the Clerks' organization will represent Shears. We are not confronted here with the case of an individual working without the protection of a collective bargaining agreement with the Carrier and without representation of a labor organization.

The Carrier was, of course, thoroughly familiar with the scope rules of its contracts with both the Telegraphers and the Clerks. Since it was a party to both of these contracts, the Carrier possessed copies of the contracts which it could present to the Board with its suggestions and evidence, if any, as to how the scope rule of each contract should be interpreted and applied. This Carrier and all persons acquainted with the personnel of the Board and the methods of its operation know that in a case such as this every possible argument in favor of the Carrier's contentions will be made before the Board regardless of whether the Clerks are or are not made parties to the proceeding there. It certainly was not necessary to the proper presentation of the Carrier's defense against the Telegraphers' claim that the Clerks' organization or Shears be made a party to the proceeding.

The Carrier's claim to substantial and irreparable damage can only be predicated on an invalid decision, adverse

to the Carrier as to the final award and order by the Board.

If the final award and order on the Telegraphers' claim is in favor of the Carrier, the Carrier, of course, suffers no possible damage, regardless of the decision of the Board as to participation by the Clerks in the proceeding and regardless of whether the Clerks' organization was given notice of the hearing or was permitted to participate in the proceedings before the Board on the Telegraphers' claim. At this stage of the proceedings before the Board we have no possible way of knowing what the final decision and award will be, but we must assume that the Board in arriving at its decision will be governed by the contracts and the evidence before it, and that all relevant evidence will be properly submitted to it and received by it.

The real problem facing the Carrier here, according to Paragraph XII of its complaint, is that the Board may make an award, first, in favor of the Telegraphers on their claim, and then make another independent award in favor of the Clerks involving the same work; and that this will result in the Carrier's having to pay members of both organizations for doing the same work although the services of the members of only one organization are actually used. Here, again, we must assume that in the making of any award the Board will properly interpret and apply the Carrier's contracts with the two organizations. If there is no ambiguity in either contract and both contracts clearly include the same work, and we may not assume that the Board would make awards in favor of both the Telegraphers and the Clerks unless both contracts do cover the work, I see no alternative for the Carrier except to let members of one craft do the work for pay, and for the Carrier to pay damages to the members of the other craft for the breach of that contract. Neither the Board nor the courts may properly change either of two valid, unambiguous contracts made by the Carrier in order to avoid the consequences to the Carrier of having made conflicting contracts with the two crafts.

The complaint does not allege that the contracts are ambiguous and since the two contracts have not been made a part of the record in this case we have no way of knowing whether there is any ambiguity in the scope rule of either contract, or whether they are so clear and

definite that they are not subject to interpretation. The mere fact, if it be a fact, that both contracts describe the same work does not mean that they are ambiguous. They are separate and independent contracts. If the contracts are not ambiguous neither the Board nor any court could do other than apply them as written. As said in *Thomas v. New York, Chicago & St. Louis R. Co.*, 6 Cir., 185 F. 2d 614, 617: "While the Board under the statute has jurisdiction to hear an individual grievance, it is not authorized to write a contract for the parties nor to create substantive legal rights."

And on the same day, to-wit: On the nineteenth day of March, 1954, the following further proceedings were had and entered of record, to-wit:

Friday, March 19, 1954.

Before:

Hon. J. Earl Major, Chief Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. H. Nathan Swaim, Circuit Judge.

Illinois Central Railroad Company, *Plaintiff-Appellee,*		Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
10959	*vs.*	
J. W. Whitehouse, *et al.*, *Defendants-Appellants,* and William H. Castle, *et al.*, *Defendants-Appellees.*		

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is ordered and adjudged by this Court that the Judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs.

And afterwards, to-wit: On the twenty-eighth day of May, 1954, there was filed in the office of the Clerk of this Court, a Designation of Record, which said Designation is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Illinois Central Railroad Company, *Plaintiff-Appellee,* vs. J. W. Whitehouse, G. Orndorff, J. H. Sylvester, Claude R. Barnes, R. Sarchett and The Order of Railroad Telegraphers, *Defendants-Appellants,* and William H. Castle, R. M. Butler, C. P. Dugan, E. T. Horsley and J. E. Kemp, *Defendants-Appellees.*	No. 10959.

DESIGNATION OF RECORD ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Now come the Defendants-Appellants, by their attorneys, Jacobs, Kamin and Ratner and Schoene & Kramer, and designate the following portions of the record and proceedings in this Court as the record to be certified to the Supreme Court of the United States for the purpose of proceedings on petition for a writ of certiorari to be filed by Defendants-Appellants:

1. Printed transcript of record in Case No. 10959.

2. Order of the Court taking Case No. 10959 under advisement.

3. Opinion of the Court dated March 19, 1954.

4. Judgment of the Court.
5. This designation.

Jacobs, Kamin and Ratner,
Schoene & Kramer,
Attorneys for Defendants-Appellants, J. W. Whitehouse, et al., and The Order of Railroad Telegraphers.

Jacobs, Kamin and Ratner,
201 North Wells Street,
Chicago 6, Illinois.

Schoene & Kramer,
1625 K Street, Northwest,
Washington 6, D. C.

Endorsed: Filed May 28, 1954. Kenneth J. Carrick, Clerk.

[fol. 127] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 131

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, et al., Petitioners.

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, et al.

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.